Filed 11/17/09 In re G.B. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re G.B. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.O., Defendant and Appellant.	E048096 (Super.Ct.No. J212769-771) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Marsha Slough, Judge. Affirmed.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant.

Ruth E. Stringer, County Counsel, and Dawn Stafford, Deputy County Counsel, for Plaintiff and Respondent.

William D. Caldwell, under appointment by the Court of Appeal, for Minors.

I. INTRODUCTION

Appellant L.O. (Mother) appeals from the February 27, 2009, orders terminating her parental rights to three of her children, G., C., and P., and placing them for adoption. She claims there is insufficient evidence to support the juvenile court's finding that the children were adoptable, and that the court further erred in proceeding with the selection and implementation hearing (Welf. & Inst. Code, § 366.26),[1] without determining whether P., then age 12, was properly notified of his right to attend the hearing or why he was not present at the hearing (§§ 349, 366.26, subd. (h)(2)).

II. FACTS AND PROCEDURAL HISTORY

A. *Background*

Mother has a lengthy history of methamphetamine use and homelessness. In October 2004, the Riverside County Department of Public Social Services (DPSS) removed all three children from Mother's care, after she left them in a Corona motel room with only spoiled food to eat and admitted using methamphetamine earlier that day. The children had only recently been returned to Mother in June 2004, following the second of two failed family maintenance plans.[2] The children have two older half

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] This is the third dependency proceeding for P. and the second for C. and G. In 1998, P. was removed from Mother's care and declared a dependent after he was hospitalized for pneumonia, Mother fell on him during a hospital visit, and the court determined Mother had negligently failed to take her seizure medication. P. was returned

[footnote continued on next page]

siblings, with whom they have had little or no contact since October 2004. The children's fathers remain alleged fathers and have not participated in the current proceedings.

Following their detention in October 2004, the children were placed together in foster care. At that time, P., a boy, was eight years old, C., a girl, was four years old, and G., a boy, was two years old. In November 2004, the caretaker reported having a "hard time" caring for C. and G. due to their behaviors. C. kicked walls and glass closet doors when she became upset. G. initially did not speak when he came to live in the home, but grunted, whined, and pointed at things he wanted. Still, the caretaker reported that C. and G. appeared to be adjusting and their overall behavior was improving. The caretaker did not report P. as having any behavioral problems. To the contrary, P. was doing well in school and did not have any "major problems."

In December 2004, Mother was denied reunification services pursuant to section 361.5, subdivision (b)(13),[3] but was later granted services in April 2005 pursuant to a

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[footnote continued from previous page]
to Mother's care in September 2000 pursuant to a family maintenance plan. Then, in November 2002, all three children were detained after it was reported that Mother continued to abuse controlled substances and neglect the children. The children were declared dependents in February 2003, but were returned to Mother's care in June 2004, again, pursuant to a family maintenance plan.

[3] Section 361.5, subdivision (b)(13) allows the court to deny reunification services to a parent if it finds by clear and convincing evidence that the parent "has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan

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section 388 petition. After Mother was granted reunification services, a section 366.26 hearing, originally set for April 2005, was vacated while Mother looked for suitable housing, with the goal of having the children returned to her care. In the meantime, the children remained in foster care. Then, in November 2005, Mother's services were terminated and a section 366.26 hearing was scheduled for March 2006.

In March 2006, the children were placed in a legal guardianship with their foster mother, Mrs. M., with whom they had been living since August 2005. In January 2007, the children's cases were ordered transferred from Riverside County to San Bernardino County where the guardian lived. Then, in September 2007, the guardianship was terminated at the request of the guardian. The guardian was unaware she had been appointed the children's guardian, and requested the termination so she would not lose income from the Foster Family Agency. The children were placed in a permanent planned living arrangement with Mrs. M. and continued to live with her family for two more months, until November 2007.

In November 2007, the children reported that Mrs. M. and her husband frequently spanked them and that the husband had struck G. on the head with his fist and hit P. with a belt. P. later admitted that Mrs. M. also struck him with a belt. The children further reported having been allowed to watch R-rated movies with the M.'s teenage children,

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required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible." As noted in footnote 2, *ante*, at the time the children were detained in October 2004, Mother had failed to benefit from two prior family maintenance plans.

which resulted in G. developing a "cussing" habit and P. calling C. sexually derogatory names when he was angry with her. The children were removed from the M.'s home and placed in another foster home.

In December 2007, the San Bernardino County Children and Family Services (CFS) recommended changing the children's permanent plans to adoption. The children were happy and in good health, with no developmental delays, emotional, or behavioral problems. They had not required any mental health or other specialized services, and were performing well in school. The social worker described the children as "very adoptable," "bright," and "attractive," who were "exceptional" because they had "weathered a lifetime of neglect and disappointment with unusual strength and resilience."[4] Their new foster mother liked them very much and wanted to be considered for adoption. The Mother was in jail and did not know when she would be released.

In October 2007, shortly before their removal from the M. family home, the children expressed interest in being adopted into a stable and loving family—other than the M. family—where they would be treated as natural children. The social worker believed the children's positive feelings toward adoption outside the M. family showed the M.'s had treated them differently from their natural children and the children were very well aware of their differential treatment. The M.'s had expressed an interest in adopting the children but only if they could obtain more money by adopting them. In

[4] Between October 2005 and December 2006, while the children were still living with the M. family, DPSS consistently reported they were in good health, did not have any behavioral problems, and were developmentally on target.

January 2008, Mrs. M. petitioned the court for de facto parent status and to return the children to her care. The social worker recommended against granting Mrs. M.'s requests and expressed confidence that a good, adoptive family—other than the M. family—could be found for the children. Thereafter, Mrs. M. withdrew her de facto parent and section 388 petitions.

B. *The Evidence Presented at the February 27, 2009, Section 366.26 Hearing*

The section 366.26 hearing was set contested by Mother, and was ultimately held on February 27, 2009. The court received a total of eight reports into evidence. These included an adoption assessment and a section 366.26 report dated June 3, 2008, and six addendum reports dated December 23, 2008, January 22, 2009, and February 27, 2009. The contents of the reports are described below.

Mother briefly testified at the hearing. She said she did not agree that the children should be adopted, but if that was their wish she was "not going to stand in their way." At the time of the hearing, P. was age 12, C. was age 9, and G. was age 6. None of the children were present at the hearing, but prior to the hearing the children consistently said they wanted to be adopted.

The June 2008 reports described G. as "a happy, go-lucky child who had a tendency to react impulsively." He struggled socially due to his temper and stubborn nature. His speech was delayed and he was being assessed for speech services. He was below grade level in all areas, including reading and math, and was believed to have cognitive delays. He cried and threw tantrums when he could not have his way, but he

was showing signs of improvement after being prescribed medication for attention deficit hyperactivity disorder (ADHD) and with discipline and reinforcement from his foster mother. He had a bed wetting problem, but he ate and slept well.

The reports described C. as "pretty . . . , well-behaved, compliant, bright, competent, and conscientious." She got along well with other children and her siblings. She was taking "very good care" of a puppy her foster mother had given her. She did not appear to have any developmental delays with the exception of some speech delays. She was performing below grade level in reading and math, but her teacher described her as "hard working and helpful in class." She was taking medication for ADHD and for anxiety. It was hoped that her anxiety was "a situational problem," and she would not need anxiety medication for long. She occasionally had enuresis.

P. was described in the June 2008 reports as "an amiable and extremely social child who is comfortable communicating with both adults and children." P. was taking very good care of another puppy his foster mother had given him. He had made good friends at his new school and enjoyed all aspects of attending school. His teacher described him as a good student who consistently stayed focused in class. He had no known developmental delays, behavioral problems, or emotional problems. He sometimes became moody if he did not get the attention or respect he felt he deserved. He had recently been referred to therapy to address the changes and losses in his life.

As of June 2008, the children had recently been referred to a joint therapy session in order to work on sibling issues and strengthen their sibling bonds. The older siblings,

P. and C., blamed G. for the children not having found an adoptive home and their prior placement changes. All of the children still wanted to be adopted. Mother was in a treatment facility and had been visiting the children every other week for two hours. Her mental illness was apparent because she made paranoid remarks and tended to ramble and not make sense. After one visit, P. said he understood why Mother would never be able to care for him or his siblings.

In December 2008, Mother's visits were suspended after one of the children's older half siblings, then age 20, showed up at the designated location for a visit without CFS approval. The children had previously told Mother they were not comfortable in the presence of the older half sibling, and social workers had discussed the matter with Mother on at least four occasions. Mother disregarded the children's feelings, however, and took no responsibility for the problem. P. later disclosed in therapy that the older half sibling had touched him inappropriately.

As of December 2008, the children had been in multiple foster care placements and had spent most of their lives in foster care. Since October 2004, P. had been in nine foster homes, not including respite homes, and was in two other foster homes during his prior dependencies between 1998 and 2000.[5] C. and G. had been in eight foster homes, not including respite homes, since October 2004, and were in two foster homes before October 2004. Between October 2004 and August 2005, when they were placed with the

[5] See footnote 2, *ante*.

M. family, the children were in three to five foster homes.[6] Following their removal from the M. family in November 2007, they were placed with Mrs. O. for one week. In early December 2007, they were removed from Mrs. O. at the behest of the social worker and placed with Mr. and Mrs. P., with whom they continued to live until shortly before the section 366.26 hearing on February 27, 2009.

All of the children exhibited some problems with "boundaries and manners" when they first came to live with Mr. and Mrs. P. in December 2007, but these problems improved over time. Then, in December 2008, Mrs. P. reported that P. had been "hanging out with the wrong crowd at school, lying constantly and misbehaving at home." P. said he felt lonely and isolated himself from others. G. was having difficulty concentrating at school and was constantly disrupting the class. G. often threw temper tantrums and would not listen. All three children were attending after-school tutoring to address academic delays. They were referred for wraparound services in order to stabilize their placement with Mr. and Mrs. P. and address sibling conflict, which had recently become a concern. C. and G. were still taking psychotropic medication, G. for ADHD, and C. for ADHD and anxiety.

Still, CFS reported in December 2008 that the children were "showing good improvements in all areas" and were doing well in their placement with Mr. and Mrs. P.

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[6] The record does not indicate the reasons for the children's multiple placements between October 2004 and August 2005. This is due, at least in part, to the transfer of the cases from Riverside County to San Bernardino County in January 2007, following the children's August 2005 placement with the M. family in San Bernardino County.

CFS believed the children's behavioral problems were not significant enough to prevent their adoption and were common for foster children who were awaiting adoptive families. According to social worker Paula Huang (SW Huang), the children had always been "good kids" but had suffered from trauma and instability in foster care. In December 2008, Mr. and Mrs. P. were not interested in adoption but were willing to keep the children as permanent foster care placements.

In early February 2009, an out-of-state adoptive home was located for the children. The children had not been placed in the home but had spoken with the parents and had seen photographs of the family. P. was very enthusiastic about being adopted. When asked how he felt about being adopted, he said, "'I feel awesome with a capital "A."'" P. had a lot of anger toward Mother and did not feel he belonged in his foster home with Mr. and Mrs. P. More than the other children, P. appreciated the importance of having an adoptive home he would never have to leave. All of the children again said they wanted to be adopted, and each gave SW Huang their permission to tell the court they wished to be adopted. The state in which the prospective adoptive parents lived would not allow the children to be adopted until parental rights to them had been terminated. Thus, CFS continued to recommend terminating parental rights and placing the children for adoption.

Shortly after the prospective adoptive placement was located in early February, Mrs. P. asked that all three children be removed from her home. When asked why, she said she felt she had been "left out" of the concurrent planning process and her feelings

were hurt. After SW Huang spoke with her, Mrs. P. agreed to allow the children to remain in her home.

Then, on February 17, CFS reported that, on February 15, P. struck another child in his foster home, and Mrs. P. had "over-reacted and called law enforcement." The police said P. was "obviously angry" but did not pose a threat to himself or others. Still, Mrs. P. took P. to the hospital where he was placed on a 72-hour hold. P. believed Mrs. P. was unfair to him and believed "everything" her children told her regardless of what P. said. P. was released on February 18. At that time, all of the children were removed from the home. Upon his release, P. was not prescribed any medication because it was not believed he needed any. All of the children later told the social worker that Mr. and Mrs. P. allowed other children to hit them in the home.

Between February 18 and 26, the children had daily visits with their prospective adoptive family, including an extended overnight visit from February 21 through 24, at a home the prospective adoptive parents rented in California. The visits went well. The prospective adoptive parents had an 11-year-old daughter with whom C. "immediately connected." P. and C. thought the family was "very nice" and were excited about living with them. G. thought the prospective adoptive father was "a good dad." All of the children told SW Huang to tell Mother they wanted to be adopted.

The prospective adoptive parents shared their observations about the children with SW Huang. They saw that P. would be the more difficult child to parent and expressed that they had had some difficulty connecting with him. Their "major concern" with P.

was that they found him to be "manipulative." They believed P. tried to present himself in a positive light and tried very hard to "hide his darker side." P. shared with them that he had an anger problem. They thought G. was a "habitual liar." They spoke to G. about this problem and observed him try to catch himself before he told a lie. They believed C. was a "'people pleaser'" and needed help building her self-esteem. They felt that none of the issues and behaviors they observed in the children were things they could not handle, however.

Following the close of evidence, the juvenile court terminated parental rights and freed the children for adoption. Mother timely appealed.

III. DISCUSSION

A. *Substantial Evidence Supports the Juvenile Court's Finding That All Three Children Were Adoptable*

Mother claims there is insufficient evidence to support the juvenile court's finding that the children were adoptable. For the reasons we explain, we disagree.

1. Applicable Law

A juvenile court may terminate parental rights if it finds by clear and convincing evidence that the child is likely to be adopted. (§ 366.26, subd. (c)(1); *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) "'"'Clear and convincing' evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]"' [Citations.]" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.)

The question of adoptability requires the court to focus on the child and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt the child. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) An adoptive parent's willingness to adopt a child indicates that the child is adoptable, meaning he or she is likely to be adopted within a reasonable time either by the adoptive parent or "*by some other family.*" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) An adoptive parent's willingness to adopt the child is not solely determinative of whether the child is adoptable, however. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400.) It is a factor to be considered with the child's age, physical condition, and emotional state. Thus, it is not necessary that a child be placed in a prospective adoptive home in order for the court to find the child is adoptable. (*In re Sarah M.*, *supra,* at p. 1649.)

We review a juvenile court's adoptability finding for substantial evidence. We determine whether the record contains substantial evidence from which the court could have reasonably found, by clear and convincing evidence, that the child is adoptable. (*In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1431.) Substantial evidence is evidence which is "'reasonable, credible, and of solid value.'" (*In re Angelia P.* (1981) 28 Cal.3d 908, 924.) The appellant has the burden of demonstrating "there is no evidence of a sufficiently substantial character" to support the court's finding. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

2. Analysis

Mother argues that the court erroneously determined the children were adoptable, in view of their lengthy history in the dependency system, multiple foster care placements, and behavioral problems. She claims there was no clear and convincing evidence of a "'high probability'" that the children, or any of them, would be adopted within a reasonable time of the hearing. Not so.

The record consistently demonstrates that the children's behavioral problems were not significant, were remediable, and were due in large measure to the stresses and strains of their multiple foster care placements and their physical and psychological abuse in some of those placements. As CFS argues, Mother ignores the children's "good points." The children showed remarkable resiliency despite the many changes and losses they suffered during their young lives. P. and C. were very sociable and got along well with other children and adults. P. generally performed well in school and enjoyed school activities. C. also enjoyed school and was helpful in class. The youngest child, G., had speech and cognitive delays but was improving. Overall, the record supports CFS's view that the children were "good kids" who would thrive in a truly stable and loving home.

Furthermore, there is no evidence that P. hit his foster mother, Mrs. P., as Mother claims. Mother has misread the record. The record indicates only that P. hit another child in Mrs. P.'s home, and there is no indication the other child was injured. There is, however, evidence that Mrs. P. overreacted to the incident, as CFS believes she did, in calling law enforcement and in taking P. to the hospital. The police did not believe P.

posed a danger to himself or others, and all three children reported that Mrs. P. had allowed other children in her home to hit the children. In addition, Mrs. P.'s motives in calling law enforcement are suspect. She wanted the children removed from her home only days before the incident, not because of anything any of them did, but because she felt "left out" of the concurrent planning process after the prospective adoptive parents were located. Thus, nothing about the incident indicates P. or his siblings were not adoptable. Indeed, in December 2008, after the children had been living with Mr. and Mrs. P. for one year, Mr. and Mrs. P. were willing to care for the children indefinitely.

Nor is there any evidence that the children were moved from one foster care placement to another due to behavioral or psychological problems. The record is silent on why the children were in three to five foster homes between October 2004 and August 2005, when their cases were in Riverside County. But since August 2005, when the children were placed with the M. family in San Bernardino County, the record is clear on why they were moved, and it was due to no fault of their own. They were moved from the M. family home because they suffered physical abuse in the home. They were moved from their next home at the behest of the social worker after only one week, again due to no fault of their own. Then they lived with Mr. and Mrs. P. for well over one year, and the evidence shows they lost that placement due to Mrs. P., not P. Mrs. M. sought the return of the children after they were removed from her home, and Mr. and Mrs. P. also wanted to keep the children, at least until a prospective adoptive home was found, and Mrs. P. felt "left out" of the concurrent planning process.

The children's relatively young ages of 12, 9, and 6 at the time of the hearing, their generally good physical conditions and emotional states, and their mutual appreciation for a stable adoptive home, all indicate that there was a high probability they would be adopted within a reasonable time. Indeed, it is an overstatement to say that P.'s anger problem was an emotional problem that would undermine his adoptability. His good points far outweighed his anger problem. The prospective adoptive parents astutely identified each child's behavioral and psychological issues and needs, and did not believe any of them were insurmountable.

B. *The Juvenile Court Did Not Prejudicially Err in Failing to Determine Whether P. Had Been Properly Notified of the Section 366.26 Hearing or Why He Was Not Present*

Mother claims the juvenile court erred in proceeding with the section 366.26 hearing without determining whether P. had been properly notified of the hearing or why he was not present. (§§ 349, 366.26, subd. (h)(2).) We find no prejudicial error.

1. Applicable Law

A minor who is the subject of a juvenile court hearing is entitled to be present at the hearing and to be represented by counsel. (§ 349.) If the minor is 10 years of age or older and is not present at the hearing, "the court shall determine whether the minor was properly notified of his or her right to attend the hearing." (*Ibid.*) When the hearing is a section 366.26 hearing, the court shall further "inquire as to the reason why the child is not present." (§ 366.26, subd. (h)(2).)

2. Analysis

None of the children were present at the section 366.26 hearing, including P., then age 12. Nor does the record indicate that the court inquired whether P. had been properly notified of the section 366.26 hearing or why he was not present. During the hearing, however, minors' counsel told the court that all of the children had been in court on the previous day, and she had spoken with each of them separately. They each indicated they were "very anxious" to be adopted and were "desperate to have a permanent home." In addition, the reports consistently indicate that P. was very enthusiastic about adoption. He expressly gave the social worker his permission to tell the court and Mother that he wanted to be adopted.

Thus here, the purpose of sections 349 and 366.26 subdivision (h)(2)—to ensure that children over age 10 may, if they so desire, be present at hearings and express their wishes to the court—was satisfied. Indeed, any error in failing to inquire whether P. had been properly notified of the hearing or why he was not present was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

To be sure, even if P. was unaware of his right to attend the hearing and would have been present had he been notified, there is no indication he would have told the court he did not want to be adopted. To the contrary, all of the evidence indicates he would have told the court he very much wanted to be adopted. Finally, P. did not have "a host of emotional problems" which indicated his "feelings" needed to be "fully explored in court," as Mother argues. Nothing in the record indicates there was any reasonable

possibility that P. was ambivalent about being adopted or might have changed his mind about being adopted by the time of the hearing.

IV. DISPOSITION

The orders terminating parental rights are affirmed.

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/s/ King
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Gaut
J.